PROTECTED IN LAW, CARED FOR IN LIFE

The new health-care act fails to satisfy pro-life principles, *Ryan T. Anderson* argues.

In one of his last major public addresses, Fr. Richard John Neuhaus declared that "until every human being created in the image and likeness of God is protected in law and cared for in life, we shall not weary, we shall not rest. And, in this the great human-rights struggle of our time and all times, we shall overcome." Protected in law and cared for in life. This is the basic pro-life political principle.

Even though the final version of the Patient Protection and Affordable Care Act (PPACA) did not contain their amendments, some congressional (and other) pro-lifers insisted that the bill is indeed consistent with this basic pro-life principle. It is not. It is premised on the claim that abortion is health care. It allows federal dollars, collected from taxpayers, to fund plans that cover abortion and even to pay for abortion directly. It fails to protect adequately the conscience rights of health-care providers and may squeeze pro-life doctors and hospitals out of the market.

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With a new congress now in office and the 2012 election campaign already beginning, pro-lifers must know exactly how the bill affects abortion funding and conscience protection. But it is even more important for us to consider how pro-life principles should guide us as we deliberate about how to fix PPACA and reform American health care.

Before examining the deficiencies of the PPACA, we should consider how pro-life considerations ought to inform our thinking about health-care reform in general. Abortion, embryonic stem-cell research, euthanasia, and suicide destroy the very same good advanced by health care: bodily life and health. This good demands our forbearance (protected in law) and places on us positive obligations (cared for in life). The two clauses of this basic pro-life principle must necessarily be applied in different ways. Protection in law is largely a matter of negative duties: of fending off unjust aggressors and protecting all members of the human family from attack. Care in life, however, is a matter of positive duties, of what each of us—and our political community—owes to our neighbors.

The good of human life and health obligates everyone to refrain from intending harm to any human being, whatever his stage of life, level of dependency, age, or location. It thus leads to the right to life and to the political enforcement of this right by the prosecution of its violators.

The good of bodily life and health also places positive obligations on everyone to advance by reasonable measures other people's physical well-being. Because there are many reasonable but incompatible ways of meeting this positive obligation, government plays a crucial role in coordinating our efforts to do so, and would play this role even if men were all perfect saints. Because we aren't perfect saints, the state must enforce those positive moral duties we flout.

Failure to mind this negative–positive distinction leads to many of the mistakes that pro-lifers make when weighing in on matters of public policy. Pro-lifers go awry when they insist that the right to be cared for in life stands in a direct parallel to the right to life and to the duty of forbearance from direct killing. The state must be concerned about promoting citizens' well-being, especially physical, and this includes ensuring access to health care even outside emergencies.

But it need not supply such care. Ensuring access to regular health care for all its citizens may best be accomplished if the state plays a limited, indirect role. Public policy brings with it many unintended side effects and unforeseen results. A policy that directly provided health care (say, through a state-run program) and directly enforced welfare duties (through increased taxation, for example) might diminish the quality and extent of care (by suppressing the competition that spurs innovation).

Such issues of efficiency are empirical questions that the pro-life principle, a *moral* claim, cannot settle. This does not mean that pro-life citizens are free to favor any policy that purports to serve citizens' health. Like all citizens, pro-lifers have a political obligation to act for the common good and to make informed decisions on which policy proposals to endorse. They need to make prudential and technical judgments about how best to ensure universal access at an affordable cost while retaining a high quality of care—and to make these judgments in a way that protects the autonomy of patients, nonprofit charities, and for-profit businesses.

These four desiderata—maximizing coverage, quality, and autonomy while minimizing cost—are difficult to achieve. Trade-offs need to be made, and making them requires both technical knowledge and prudence. It requires knowledge of how economic incentives work, how waste can be cut, how innovation can be encouraged, how costs can be lowered, how access can be increased. Pro-lifers will not agree on which policy to favor, since such an overall judgment requires appeal to considerations other than specifically pro-life ones. This is why pro-lifers will not—need not—be of one mind in responding to the question of how best to meet the health-care needs of our fellow citizens.

But it is worth reiterating that pro-lifers *are* committed to the principle that killing is not care: any health-care reform worthy of the name will exclude funding for abortion, euthanasia, and physician-assisted suicide. This point, unlike other factors about which pro-lifers must make conscientious and informed prudential judgments, is simply fixed by the good of all human life.

So does PPACA promote abortion, as its pro-life critics charge, or is it abortion-neutral, as its pro-life defenders claim? A look at its clear statutory language in light of prevailing judicial precedent shows that this bill is woefully deficient on abortion and conscience protection. Events since its passage confirm this. In particular, (1) the Hyde Amendment does not apply to the act; (2) President Obama's executive order is legally ineffective at extending to it Hyde-like protections; (3) community health centers funded by PPACA may even be *required* to perform abortions; (4) the health-care exchanges established by the act will fund plans that cover abortion and thus force

citizens to either fund abortion directly or possibly forgo the best plan for them; and (5) the act allows the government to discriminate against pro-life doctors and health providers.

Three years after the Supreme Court struck down virtually all laws restricting abortion in *Roe v. Wade*, Representative Henry Hyde introduced an amendment to the Health and Human Services appropriations bill that prevented funds appropriated in that act from being used to pay for abortions or plans that cover abortions. The Hyde Amendment has been passed annually since then to prevent federal taxpayer monies from supporting abortion, and it is estimated that over one million lives have been saved as a result. The Hyde Amendment, or something like it, is necessary both to protect citizens from becoming complicit in the evil of abortion and to save unborn children. PPACA is not governed by the Hyde Amendment since it has its own sources of funding and Hyde applies only to the programs funded by the appropriations bill to which it is attached. Various attempts to include Hyde Amendment language in the act were rejected by both the Senate and the House.

Obama tried to assuage pro-life concerns by issuing an executive order that purported to restrict what PPACA would cover with respect to abortion. But this executive order is impotent, for an executive order cannot legally override contrary statutory law as that law is interpreted by the courts. The popular press, and some pro-lifers, have misunderstood this point. For the last several decades, federal courts have consistently held that federal statutes mandating "family planning" and certain similar categories of service must be understood to require abortion coverage unless Congress passes a law explicitly excluding abortion. An executive order excluding abortion will not in fact exclude abortion when it conflicts with statutory mandates. This is why Planned Parenthood president Cecile Richards dismissed Obama's executive order as merely "a symbolic gesture." Earlier this year, Obama's former chief of staff Rahm Emmanuel admitted that the administration put this language in an executive order "to allow the Stupak Amendment not to exist by law."

PPACA requires community health centers to provide "family planning" and "gynecology" services. Long-standing judicial precedent takes these terms to include provision of abortion—unless there is statutory language explicitly preventing abortion funding. In the case of PPACA, there is not. Community health centers funded through the law will not only be *free* to provide abortion; under this law, they might be held to be *required* to do so. While the Secretary of Health and Human Services claims that an HHS regulation will prevent federal funds from paying for abortion, this regulation cannot override a federal statute.

Even if, *per impossibile*, the executive order and the HHS regulations would have effect, it remains true that PPACA crosses a new line: it allows—for the first time in American history—the public funding of health-care plans that cover abortion. The Hyde Amendment included two critical clauses (as did the Stupak Amendment that Congress rejected). The first provides that no funds "shall be expended for any abortion," the second that no funds "shall be expended for health benefits coverage that includes coverage of abortion." The executive order left out the second clause.

The second clause is so important because funding is fungible. To spend federal funds on health plans that cover abortion but require that the abortions themselves be covered by a separate account is to engage in what Senator Barbara Boxer, who passionately favors federal funding of abortion, rightly dismissed as a mere "accounting procedure." On this plan, taxpayer dollars will be used to free up insurance companies' other funds to pay for the act of killing. Henry Hyde and those who have supported his amendment for 35 years understood this elementary point, which is why they included the second clause.

By not including Hyde Amendment language in PPACA, Congress left itself free to fund abortion-covering plans. This will force some citizens either to write a check to the federal government that will defray the costs of destroying innocent life and nothing else, or else forgo adequate health care.

PPACA will force citizens into this dilemma because of how its "accounting procedure" segregates funds. In the Health Insurance Exchanges that each state must establish under PPACA, only *one* plan need not cover abortion. All of the other plans may cover abortion. Anyone signed up for one of the plans that cover abortion is required to write two checks as payment for his premium. One check covers the basic costs of the plan, and the other goes directly into a fund that pays only for abortions. So far, private health plans have been permitted under our law to make accommodations for those of us who oppose the taking of human life by abortion, and insurers have done just that when enough premium payers demand it. The new legislation, however, forbids them to do so, by requiring that each enrollee in such plans, without exception, pay the abortion fee.

Each state will have a different distribution of plans, but since the law requires only that one plan

not cover abortion, a family may be unable to find a plan that both meets its needs and does not cover abortion. PPACA will force such citizens either to sign up for an inadequate health plan or be complicit in abortion. Either way, the Health Insurance Exchanges and their segregation of funds will establish, for the first time in American history, federally subsidized plans that cover abortion.

Recent history has already vindicated the pro-life critics' worries about PPACA. Last summer, three states began to implement one part of PPACA, the high-risk insurance pools. When Pennsylvania, New Mexico, and Maryland finished crafting their plans, which are entirely funded by the federal government, National Right to Life created a media frenzy by noting that each of these plans included abortion funding. The states did not interpret anything in PPACA as excluding abortion coverage from their plans. Rather, they followed prevailing law by interpreting broadly worded categories of services (like gynecological services) to cover abortion, given that abortion was not explicitly excluded. Sensing the political costs involved in such a measure, the Secretary of Health and Human Services forced the three states to exclude abortion from their plans.

The only way in which the Secretary of HHS could legally prevent these states from funding abortion in their high-risk plans was through a line in the PPACA that applied specifically and only to the high-risk pools that required the states to meet "any other requirements determined appropriate by the Secretary." Nothing in the bill itself prevented the high-risk pools from covering abortion with federal funds. (That the HHS Secretary felt the political backlash to PPACA and acted accordingly is little comfort: When the political winds blow in the other direction, the Secretary may well *require* plans to cover abortion.)

Pro-choice groups immediately seized on this point to register their displeasure. The president of Planned Parenthood said that "this decision has no basis in the law and flies in the face of the intent of the high-risk pools." In an e-mail sent to its supporters, Planned Parenthood noted that "no law passed by Congress forced this decision." The Pro-Choice Caucus of Congress decried the federal government's "narrow[ing]" of the scope of "legal reproductive health care services" available to women. The director of the Washington Legislative Office of the ACLU correctly noted that "the White House has decided to voluntarily impose the ban for all women in the newly-created high risk insurance pools . . . . What is disappointing is that there is nothing in the law that requires the Obama administration to impose this broad and highly restrictive abortion ban."

The White House Office of Health Reform attempted to head off some of this backlash. On the very same day that HHS announced that the high-risk pools couldn't cover abortion, the head of the office released a statement noting that HHS's decision "is not a precedent for other programs or policies [under PPACA] given the unique, temporary nature of the program." When it comes to abortion funding, it is clear that PPACA is not pro-life.

In addition to PPACA's funding of abortions and subsidizing of abortion plans, pro-lifers should be concerned about its lack of adequate conscience protections and what this might mean given an increased role for federally funded health care. When the Senate was drafting the bill, it explicitly rejected the Weldon Amendment, long-accepted language that provides conscience protection for those opposed to abortion, particularly for health-care providers. That the Senate refused to include this longstanding language should give pro-lifers pause, especially given the role that abortion interests played in drafting the reform. Conscience protections that apply in most other areas of federal law do not apply to PPACA.

While PPACA prohibits health-care plans that qualify to participate in state health insurance exchanges from discriminating against any health-care provider or facility because of its unwillingness to provide, pay for, or refer for abortions, it does not encompass refusals to train for abortion. More importantly, it does not protect health-care entities against discrimination by various government entities or institutions receiving federal funds. Federally funded insurance companies could legally refuse to cover hospitals and physicians unless they perform abortions, and federally funded hospitals could refuse to employ doctors unless they agree to perform abortions.

The protection from discrimination by governmental actions defined in PPACA is limited to procedures designated as assisted suicide, so-called mercy killings, and euthanasia. While abortion cannot be classified as an "essential health benefit" according to the new law, it can be classified under other categories of mandated services. Each of these categories is left to the Secretary of HHS to define. Thus HHS can declare that abortion is one of the services that any health-care plan or provider must perform in order to be eligible for federal funding. As more and more of the health-care industry comes to rely on federal funding, pro-life doctors and hospitals—particularly religious institutions—might very well find themselves squeezed out of the market.

Federal funding for abortion and inadequate conscience protections are the main problems, from a pro-life perspective, with PPACA. While there can be reasonable disagreement within the pro-life community about many aspects of the health-care debate, on this pro-lifers must speak out with one voice: Abortion is not health care. It provides neither protection in law nor care in life. Any health-care reform that funds abortion, funds plans that cover abortion, or allows for federally funded discrimination against pro-life doctors and hospitals, is not authentic health-care reform and must be either remade or replaced.

Pro-life principles alone cannot settle the question of what to do about PPACA. Its allowance of abortion funding and failure to protect conscience must be addressed, but a pro-lifer could in good faith favor simply amending PPACA to protect life and conscience or replacing the law wholesale. The plurality of legitimate political options requires pro-life groups and religious leaders to exercise restraint in speaking on PPACA.

However, as faithful citizens, pro-lifers can hardly be neutral about how to enact necessary reforms. Politics demands a choice. Principle must be prudently applied. And pro-lifers must take account of what is possible given partisan electoral realities. FT

Deferred

I never shot a commie or a Nazi
In '66, but this is what I did:
Field-stripped an M1 when I was in ROTC.
There were a lot of metal things that slid,
And springs and clips and T-shaped bits galore.
Clip latches, swivels, trigger guard, and trigger
All fell apart. I never went to war.
I think it would have asked for far more rigor
Disassembling my first carburetor.
I learned you never call your piece a gun.
I learned there'd be no sacrifice much greater
Than two semesters' drill with that M1
To get me out of Michigan's PE
Requirement. By April, I was free.

—Len Krisak